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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 JOHN ADAMSON, et al.,
12 Plaintiffs,
13 v.
14 ADT, LLC, d/b/a ADT SECURITY
15 SERVICES,
16 Defendant.

) Case No. CV 12-10558 DMG (PLAx)
) **ORDER RE DEFENDANT’S MOTION**
) **FOR SUMMARY JUDGMENT [DOC. #**
) **75]**
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18 This matter is before the Court on the Motion for Summary Judgment filed by
19 Defendant ADT LLC, d/b/a ADT Security Services, on January 31, 2014 [Doc. # 75].
20 The Court held a hearing on the Motion on April 4, 2014. The Court has duly considered
21 the arguments and evidence presented in support of and in opposition to the Motion. For
22 the reasons discussed below, Defendant’s Motion for Summary Judgment is **GRANTED**
23 **in part and DENIED in part.**

24 **I.**

25 **PROCEDURAL HISTORY**

26 On September 30, 2014, Plaintiffs John Adamson, Michal Clark, John Llewellyn,
27 Andrea Stanley, and Jackie Warncke, all current or former customers of ADT, filed a
28 Second Amended Class Action Complaint (“SAC”) against ADT raising claims

1 concerning ADT's Early Termination Fees ("ETFs") and ADT's unilateral price
 2 increases. [Doc. # 62.] The SAC asserts the following causes of action: (1) violation of
 3 Cal. Civ. Code § 1671; (2) violation of the Consumer Legal Remedies Act ("CLRA"),
 4 Cal. Civ. Code § 1750 *et seq.*; (3) violations of the California Unfair Competition Law
 5 ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) violations of the Maryland
 6 Consumer Protection Act, Md. Code, Com. Law § 13-101 *et seq.*; (5) violations of the
 7 Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*; (6) declaratory relief; and (7)
 8 unjust enrichment. [Doc. # 62.]

9 ADT filed the instant Motion for Summary Judgment as to all causes of action on
 10 January 31, 2014. [Doc. # 75.] Plaintiffs filed an Opposition on March 14, 2014. [Doc.
 11 # 85.] ADT filed a reply on March 21, 2014. [Doc. # 98.]

12 II.

13 **FACTUAL BACKGROUND**¹

14 There is no material dispute of fact as to the following, unless otherwise noted:

15 A. **Early Termination Fees**

16 Currently, all of ADT's customer agreements are two or three year term contracts
 17 with a 75% ETF. (Consolidated Separate Statement of Undisputed Fact and Supporting
 18 Evidence ("CSSUF") ¶ 47 [Doc. # 98-1].) ADT's contracts with John Adamson, John
 19 Llewellyn, and Andrea Stanley provide:²
 20

21 Your early termination of the contract. You agree that the
 22 charges due under this contract are based on your agreement to
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24 ¹ ADT makes several evidentiary objections. The Court only addresses the objections to the
 25 extent they relate to material facts upon which the Court relies.

26 ² The parties do not cite to an ETF provision in Jackie Warncke's contract, but they do not
 27 dispute that she failed to pay the ETF that was assessed when she terminated her contract. (CSSUF ¶
 28 32.) Neither party provides the Court with a copy of Wilma Clark's home security services contract.
 ADT's Motion asserts that Clark's 1996 contract had an ETF of 100% (Mot. at 9), but there is no
 evidence in the record to support this. ADT also states that Warncke's contract, which was issued by
 Broadview, a company ADT acquired, had a 100% ETF. (*Id.*)

1 receive and pay for the services for . . . years. Accordingly, you
 2 agree that if you terminate this contract during its initial term,
 3 you will pay us an amount equal to 75% of the charges to be
 4 paid by you during the remaining initial . . . term of this
 5 contract.”

6 (CSSUF ¶ 8 (Adamson); ¶ 30 (Llewellyn); ¶ 39 (Stanley).)

7 **B. The Parties Dispute Whether ADT’s Contracts Provide Hidden Credit.**

8 Plaintiffs assert that ADT recovers the cost of parts and installation through each
 9 month’s service payment on ADT’s two or three year contracts. (SAC ¶ 170). In
 10 support of this theory, they provide the following evidence: (1) an ADT advertisement
 11 stating: “Free Home Security System! \$850 value at NO COST to you for parts and
 12 activation with only a \$99 Customer Installation Charge and the purchase of alarm
 13 monitoring services” (Declaration of Timothy Fisher ¶ 16, Exh. N [Doc. # 85-1]); (2)
 14 testimony by John Llewellyn that when his equipment malfunctioned, ADT offered him
 15 the choice between paying for new equipment and labor, or signing a new contract that
 16 would cover these costs (Fisher Decl. ¶ 8, Exh. F (“John Llewellyn Depo. 13:1-7”) [Doc.
 17 # 85-1]); and (3) ADT’s contracts, providing that ADT may cancel the contract under
 18 certain circumstances, and that if ADT cancels, “ADT will refund any advance payments
 19 made for services to be supplied after the date of such termination, *less any amounts still*
 20 *due for the installation of the equipment*, for services already rendered and for any other
 21 charges due.” (Declaration of Paul Slattery ¶ 12, Exh. K at pg. 6 pt. 19(A) [Doc. # 75-12]
 22 (emphasis added).)

24 Although Plaintiffs dispute this, ADT contends that the monthly charges cover the
 25 ongoing security monitoring service and have nothing to do with installation, labor, or
 26 equipment. They point to testimony by ADT’s Chief Financial Officer for the
 27 Residential Business Unit that ADT does not recoup savings offered at the beginning of a
 28 contract and that the recurring bills during the term of the contract do not change based

1 on the “installation value.” (Paul Slattery Decl. ¶ 22, Exh. U (“Ken Porpora Depo.”) at
 2 304:20-25; 305:1-22 [Doc. # 75-33].) ADT also proffers testimony by its Manager of
 3 Due Diligence in Authorized Dealer Operations that the amount ADT charges for the
 4 security equipment and installation has no impact on the monthly monitoring rate. (Paul
 5 Slattery Decl. ¶ 20, Exh. S (“Barbara Rabba Depo.”) at 114:13-17 [Doc. # 75-20].)
 6 Instead, the monthly monitoring rate is “contingent upon the service. It has nothing to do
 7 with the equipment.” (*Id.* at 115:18-21.) Depending on your service, however, you may
 8 need certain equipment. (Timothy Fisher Decl. ¶ 21, Exh. S (“Barbara Rabba Depo.”) at
 9 116:19-23 [Doc. # 85-1].)³

10 ADT’s “dealer guidelines” outline what a dealer can “charge and what services are
 11 included in that rate.” (*Id.* at 49: 8-11.) These guidelines change when there are “price
 12 changes,” such as when ADT has “added new equipment.” (*Id.* at 18-24.) The dealer is
 13 an independent business that buys the equipment and can charge “what’s reasonable,” as
 14 long as the dealer charges a minimum of \$99. (Supplemental Declaration of Paul Slattery
 15 ¶ 3, Exh. B (“Barbara Rabba Depo.”) at 35:21-24 [Doc. # 98-2].)

16 ADT has a “credit worthiness” system for new customers, but the monthly fee does
 17 not vary with the customer’s score. (Ken Porpora Depo. at 300:4-21.) ADT bills at least
 18 some customers in advance of service. (Fisher Decl. ¶ 6 Exh. D (“Deposition of Jackie
 19 Warncke”) at 13:2-5; 81:15-19 [Doc. # 85-1].)

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26 ³ Plaintiffs assert that Exhibit M to the Fisher Declaration establishes that customers who
 27 “purchase expensive equipment at a discount are charged more than customers who purchase less
 28 expensive equipment.” (Opp’n at 25.) There is no indication in the record that Exhibit M is ADT
 policy, or that it reflects this proposition.

1 **C. Material Facts Pertaining to Each Plaintiff**

2 **1. California Plaintiffs**

3 **a. John Adamson**

4 John Adamson signed a three-year contract with ADT on June 25, 2012. (Slattery
5 Decl. ¶ 2, Exh. A [Doc. # 75-2].) In April 2013, Adamson called ADT to terminate his
6 service. (Slattery Decl. ¶ 3 (“Deposition of John Adamson”) at 21:8-24 [Doc. # 75-3].)
7 At that time, he knew he would be charged an ETF. (*Id.* at 22:2-5.) He paid the ETF.
8 (*Id.* at 23: 1-15.) Adamson does not allege that ADT ever increased his monthly fee.
9 (CSSUF ¶ 8.)

10 **b. Michal Clark**

11 Michal Clark is the successor-in-interest in this action to his mother, Wilma Clark,
12 who is deceased. Wilma Clark signed a home security services contract with ADT in or
13 about July 1996. (CSSUF ¶ 19.) The parties dispute whether she was ever charged and
14 ever paid an ETF. According to ADT, Wilma Clark did not pay an ETF and was not
15 charged one. ADT points to billing records for Clark’s Home Security Account, noting
16 that there are no charges to her account after cancellation and no evidence of payment of
17 an ETF at any time. (Declaration of Kim Harris ¶¶ 5-6, Exh. B [Doc. # 75-23].) Michal
18 Clark does not dispute that he lacks any documentation that his mother paid the fee. (*Id.*
19 at 35:17-25.) There is no evidence that ADT ever charged Wilma Clark a unilateral rate
20 increase.
21

22 **2. Maryland Plaintiffs**

23 **a. Andrea Stanley**

24 Andrea Stanley signed a contract with ADT on May 10, 2008. (Slattery Decl. ¶ 19,
25 Exh. R [Doc. # 75-19].) Her rates were never increased. (CSSUF ¶ 35.)

26 **b. Jackie Warncke**

27 Jackie Warncke signed a three-year contract with Broadview/ADT on May 25,
28 2010. (Slattery Decl. ¶ 15, Exh. N [Doc. # 75-15].) ADT never charged Warncke an

1 increased fee. (CSSUF ¶ 35.) Warncke did not pay the ETF that ADT charged her when
 2 she terminated her contract. (CSSUF ¶ 32.) Warncke claims that she suffered harm from
 3 the ETF charge in the form of “multiple credit calls, past collection notices, harassing
 4 credit agencies.”⁴ (Fisher Decl. ¶ 6 Exh. D (“Deposition of Jackie Warncke”) at 17:16-18
 5 [Doc. # 85-1].) Under ADT policy, a customer who voluntarily cancels a contract and
 6 does not pay the ETF will “30 days later . . . be automatically placed with one of [ADT’s]
 7 collection agencies.” (Fisher Decl. ¶ 10 Exh. H (“Phil McDevit Depo.”) at 45:12-20
 8 [Doc. # 85-1]; CSSUF ¶ 60.)

9 **3. Georgia Plaintiff**

10 **a. John Llewellyn**

11 John Llewellyn signed a three year contract with ADT on August 11, 2011 and is
 12 still a customer of ADT and, therefore, he has never paid an ETF. (CSSUF ¶ 22.) The
 13 parties agree that Llewellyn’s contract contains the following provision:

14 Increases in Charges. ADT has the right to increase the annual
 15 service charge at any time after the first year. If I object in
 16 writing to the increase within thirty (30) days of receiving
 17 notice of the increase, and if ADT does not waive the increase,
 18 then I may terminate this Contract effective thirty (30) days
 19 after ADT’s receipt of my written notice of termination. In this
 20 situation, I will not have to pay the contract termination charges
 21 described in Paragraph 2 above [referring to the ETF].
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26 ⁴ ADT objects to this evidence as hearsay and on the basis of the best evidence rule. The
 27 objections are overruled. This testimony is not hearsay to the extent it is offered as evidence that these
 28 incidents occurred and any reasonable inferences to be drawn therefrom—not that Warncke was
 reported to a credit agency by ADT.

(Slattery Decl. ¶ 12, Exh. K (“Llewellyn Contract”) at 4 [Doc. # 75-12].) In Llewellyn’s October 2012 bill, ADT notified him that his rate had increased \$1.79 per month. (Slattery Decl. Exh. L [Doc. # 75-13].)

III.

STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) (“Rule 56 requires the parties to set out facts they will be able to prove at trial.”). “[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). “It is well settled that a non-moving party must present “more than a ‘mere . . . scintilla of evidence’ to defeat a motion for summary judgment.” *United States v. \$11,500.00 in U.S. Currency*, 710 F.3d 1006, 1019-20 (9th Cir. 2013) (*quoting Int’l Church of Foursquare Gospel v.*

1 *City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (alteration in original) (quoting
 2 *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

3 IV.

4 DISCUSSION

5 A. Article III Standing

6 To establish Article III standing, a plaintiff must satisfy a three-part test: (1) the
 7 plaintiff “must have suffered an injury in fact—an invasion of a legally protected interest
 8 which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or
 9 hypothetical”; (2) “there must be a causal connection between the injury and the conduct
 10 complained of,” i.e., “the injury has to be fairly traceable to the challenged action of the
 11 defendant, and not the result of independent action of some third party not before the
 12 court”; and (3) “it must be likely, as opposed to merely speculative, that the injury will be
 13 redressed by a favorable decision.” *San Luis & Delta-Mendota Water Auth. v. Salazar*,
 14 638 F.3d 1163, 1169 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S.
 15 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) (internal quotation marks
 16 omitted), *cert. denied*, 132 S. Ct. 498, 181 L.Ed.2d 388 (2011); *see also Simon v. Eastern*
 17 *Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n. 20, 96 S. Ct. 1917, 48 L.Ed.2d 450 (1976)
 18 (named plaintiffs who represent a class must allege and show that they personally have
 19 been injured). The party invoking federal jurisdiction bears the burden of establishing
 20 standing for each form of relief sought. *Lujan*, 504 U.S. at 561.

22 It is undisputed that Adamson and Llewellyn paid an ETF and an increased fee
 23 respectively and, therefore, they have Article III standing. ADT argues that Stanley and
 24 Warncke lack Article III standing because, although each was charged an ETF, they
 25 never paid the fees. ADT also argues that Clark lacks standing because there is no
 26 evidence that she ever was charged or paid an ETF.
 27
 28

1 **1. There is a Triable Issue of Fact Regarding Whether Stanley and**
 2 **Warncke Have Been Injured for Purposes of Article III Standing.**

3 ADT argues that merely being charged a fee does not constitute injury for purposes
 4 of Article III standing. Plaintiffs respond that Stanley and Warncke have been injured
 5 because their failure to pay the ETFs has harmed their credit, and injury relating to their
 6 credit reports is sufficient to confer Article III standing. *See, e.g., Townsend v. Nat'l*
 7 *Arbitration Forum, Inc.*, No. 09-9325, 2012 WL 12736, *6 (C.D. Cal. Jan. 4, 2012)
 8 (“injury relating to his credit score reports [is] sufficient to confer Article III standing.”);
 9 *Parino v. BidRack, Inc.*, 838 F. Supp. 2d 900, 909 (N.D. Cal. 2011) (although not
 10 explicitly considering Article III standing, the court exercised jurisdiction over case
 11 where plaintiff was charged a fee but it was unclear whether she ever paid it); *Urquhart*
 12 *v. Manatee Mem'l Hosp.*, No. 806-1418T-17, 2007 WL 2010761, *3 (M.D. Fla. July 6,
 13 2007) (bill sent to collections agency sufficient injury for Article III standing); *see also*
 14 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.
 15 Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (injury-in-fact for Article III purposes must be
 16 “actual or imminent”).⁵

17
 18 Plaintiffs present evidence sufficient to create a triable issue of fact as to whether
 19 Stanley and Warncke’s credit has been damaged or imminently will be damaged by their
 20 failure to pay the charged ETFs: They did not pay the charged ETFs, and under ADT
 21

22 ⁵ At oral argument, ADT pointed to cases cited on pages 15 through 17 of its reply brief to argue
 23 that Stanley and Warncke lack standing. The majority of the cases ADT cites do not address Article III
 24 standing, but rather standing under the UCL. Standing under the UCL is “substantially narrower than
 25 federal standing under article III.” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 324, 120 Cal. Rptr.
 26 3d 741 (2011). The remaining cases ADT cites concern standing under the Fair Credit Reporting Act,
 27 not Article III, or are factually distinguishable nonbinding cases. None of the cases cited address Article
 28 III standing based on injury to credit. *See, e.g., Delano Farms Co. v. California Table Grape Comm’n*,
 546 F. Supp. 2d 859, 890 (E.D. Cal. 2008) (grower lacked standing to seek refunds of past assessments
 to a commission for which it was already reimbursed); *Hargis v. Access Capital Funding, LLC*, 674 F.3d
 783, 791 (8th Cir. 2012) (mortgage borrower whose payments could not be traced to allegedly unlawful
 mortgage fees lacked standing to challenge fees).

1 policy a customer who voluntarily cancels a contract and does not pay the ETF will “30
2 days later . . . be automatically placed with one of [ADT’s] collection agencies.” (Fisher
3 Decl. ¶ 10 Exh. H (“Phil McDevit Depo.”) at 45:12-20 [Doc. # 85-1]; CSSUF ¶ 60.)
4 According to Plaintiffs, Warncke has suffered harm from the ETF charge in the form of
5 “multiple credit calls, past collection notices, harassing credit agencies.” (Fisher Decl. ¶
6 6 Exh. D (“Deposition of Jackie Warncke”) at 17:16-18 [Doc. # 85-1].) This evidence
7 creates a triable issue of fact as to whether Stanley and Warncke’s credit was harmed by
8 their failure to pay the charged ETFs.

9 Accordingly, ADT’s Motion for Summary Judgment on the ground that the
10 Maryland Plaintiffs lack Article III standing is **DENIED**.

11 **2. Wilma Clark Lacks Article III Standing.**

12 ADT argues that Wilma Clark lacks Article III standing because she was never
13 charged nor paid an ETF. As detailed above, ADT’s billing records give no indication
14 that Wilma Clark was charged or paid an ETF. In response, Wilma Clark’s son offers a
15 hearsay statement based on what his mother told him that she did in fact pay an ETF.
16 There is no other admissible evidence in the record showing that Wilma Clark was
17 charged or paid an ETF, such that she sustained an Article III injury-in-fact. Summary
18 judgment is therefore **GRANTED** as to the claims asserted on behalf of Clark.

19 **B. The Voluntary Payment Doctrine Does Not Bar Plaintiffs’ Claims.**

20 ADT argues that Adamson and Llewellyn voluntarily paid the ETF or the
21 increased rate, and thus their claims are barred by the voluntary payment doctrine.

22 The voluntary payment doctrine prevents recovery of money by a plaintiff who
23 voluntarily paid with “full knowledge of the facts.” *Am. Oil Serv. v. Hope Oil Co.*, 194
24 Cal. App. 2d 581, 586, 15 Cal. Rptr. 209 (1961). A payment made “under protest” is
25 insufficient to make it involuntary. *Steinman v. Malamed*, 185 Cal. App. 4th 1550, 1558,
26 111 Cal. Rptr. 3d 304, 309 (2010). An involuntary payment is one which is made under
27 “duress, coercion, or compulsion, when the payor has no other adequate remedy to avoid
28

1 it.” *Id.* (citing *W. Gulf Oil Co. v. Title Ins. & Trust Co.*, 92 Cal. App. 2d 257, 264, 206
2 P.2d 643, 648 (1949)). A payment is made under duress where a “reasonably prudent
3 man finds that in order to preserve his property or protect his business interests it is
4 necessary to make a payment of money which he does not owe.” *Id.* (citing *W. Gulf Oil*
5 *Co.*, 92 Cal. App. 2d at 265).

6 There is a split of authority among district courts on whether the voluntary
7 payment doctrine applies to violations of “statutorily defined public policy,” such as the
8 consumer protection violations alleged here. *See Sobel v. Hertz Corp.*, 698 F. Supp. 2d
9 1218, 1223-24 (D. Nev. 2010) (collecting cases). Plaintiffs argue persuasively that the
10 doctrine does not apply at all because the statutory provisions at issue are designed by the
11 legislature to protect consumers and cannot be waived. It does not appear that any
12 California appellate court or the Ninth Circuit has weighed in on this issue. Some district
13 courts addressing statutory consumer protection claims appear to assume, without
14 discussion, that the doctrine applies. *See, e.g., Belle v. Chrysler Grp., LLC*, No. 12-
15 00936, 2013 WL 949484, *8 (C.D. Cal. Jan. 29, 2013); *Parino v. BidRack, Inc.*, 838 F.
16 Supp. 2d 900, 909 (N.D. Cal. 2011); *but see Sobel*, 698 F. Supp. 2d at 1223-24 (voluntary
17 payment doctrine does not apply to statutory consumer protection claims under Nevada
18 law); *Indoor Billboard / Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash. 2d 59,
19 86, 170 P.3d 10 (2007) (voluntary payment doctrine does not apply to statutory consumer
20 protection claims under Washington law).

21
22 This Court need not decide whether the voluntary payment doctrine applies to
23 statutory consumer claims at this time, because it concludes that even if it did, it does not
24 preclude Adamson or Llewellyn’s claims under the circumstances of this case.

25 **1. Adamson**

26 Under ADT policy, when a customer voluntarily cancels a contract and does not
27 pay the ETF, “30 days later, if no payment has been recorded in the system, that account
28 will be automatically placed with one of our collection agencies.” (CSSUF ¶ 60.) Even

1 without knowledge of this fact, a “reasonably prudent” ADT customer would find it
2 “necessary to make the payment” to prevent referral to a collection or credit agency. *See*
3 *Steinman*, 185 Cal. App. 4th at 1558 (quoting *Western Gulf Oil*, 92 Cal.App.2d at 266);
4 *Parino v. BidRack, Inc.*, 838 F. Supp. 2d 900, 909 (N.D. Cal. 2011) (“payment to her
5 credit card company so that she could stay in good standing with creditors while pursuing
6 this action would not bar her claim” under the voluntary payment doctrine). Because
7 Adamson faced a choice between payment and potential harm to his credit for non-
8 payment of a debt, the Court concludes that the voluntary payment doctrine does not bar
9 his claims. *See Steinman*, 185 Cal. App. 4th at 1558; *Parino v. BidRack, Inc.*, 838 F.
10 Supp. 2d at 909.

11 Accordingly, summary judgment is **DENIED** as to Adamson on the basis of the
12 voluntary payment doctrine.

13 **2. Llewellyn**

14 The SAC raises three claims on behalf of Llewellyn: (1) violation of TILA—a
15 federal claim; (2) declaratory relief, based in part on the TILA violation and other
16 violations not pertaining to Llewellyn; and (3) unjust enrichment, again based partially on
17 the alleged TILA violation.

18 ADT summarily asserts that Llewellyn’s TILA claim is barred by the voluntary
19 payment doctrine, citing *American Oil Service v. Hope Oil Company*, 194 Cal. App. 2d
20 581, 584, 15 Cal. Rptr. 209 (1961), a case which involves purely California state law
21 claims. (Mot. at 20.) Despite an extensive search, the Court located only one case
22 applying the voluntary payment doctrine to a federal TILA claim. In *Murry v. America’s*
23 *Mortgage Banc, Inc.*, No. 03-5811, 2006 WL 1647531 (N.D. Ill. June 5, 2006), the Court
24 remarked, without further analysis, that “[t]he voluntary payment defense only bars
25 claims for rescission” under TILA, citing an Illinois state case, which did not involve a
26 TILA claim. *Id.* at *4 (citing *King v. First Cap. Fin. Servs. Corp.*, 215 Ill.2d 1, 293
27 Ill.Dec. 657, 828 N.E.2d 1155, 1170 (Ill. 2005)). As the Court does not find this sole
28

1 conclusory statement in a non-binding case persuasive, the Court declines to apply the
2 voluntary payment doctrine, a creature of state law, to a federal TILA claim absent
3 evidence of Congressional intent to permit this type of waiver.

4 Summary judgment on the basis of the voluntary payment doctrine's application to
5 Llewellyn is **DENIED**.

6 **C. Count I on Behalf of Adamson – Violation of Cal. Civ. Code § 1671.**

7 ADT contends that the ETFs, consisting of 75% of the remaining fees in its
8 contracts, are an alternative means of performance as a matter of law and not unlawful
9 liquidated damages provisions under Cal. Civ. Code § 1671. Therefore, they move for
10 summary judgment on Adamson, Llewellyn, and Stanley's ETF claims, because among
11 the five plaintiffs, only these plaintiffs had ETFs of 75%. (Mot. at 9.) Yet, Llewellyn has
12 not been charged or paid an ETF. It is undisputed that he is still a customer of ADT.
13 Moreover, the SAC asserts only the TILA claim on his behalf. In addition, Stanley's
14 claims rest on provisions of the Maryland Commercial Code, and ADT's Motion raises
15 no argument with respect to those provisions. Therefore, the Court's analysis below
16 pertains only to Adamson's claim under Cal. Civ. Code § 1671.

17
18 Plaintiffs argue that ADT's ETFs of 75% violate section 1671, which provides in
19 relevant part:

20 [A] provision in a contract liquidating damages for the breach
21 of the contract is void except that the parties to such a contract
22 may agree therein upon an amount which shall be presumed to
23 be the amount of damage sustained by a breach thereof, when,
24 from the nature of the case, it would be impracticable or
25 extremely difficult to fix the actual damage.

26 Cal. Civ. Code § 1671(d). The question whether a contractual provision is an
27 unenforceable liquidated damages provision is one for the court. *Morris v. Redwood*
28 *Empire Bancorp*, 128 Cal. App. 4th 1305, 1314, 27 Cal. Rptr. 3d 797, 802 (2005).

1 Under the alternative performance doctrine, “a contractual provision that merely
2 provides an option of alternative performance of an obligation does not impose damages
3 and is not subject to section 1671 limitations.” *In re Cellphone Termination Fee Cases*,
4 193 Cal. App. 4th 298, 328, 122 Cal. Rptr. 3d 726, 752 (2011) (citing *Garrett v. Coast &*
5 *S. Fed. Sav. & Loan Assn.*, 9 Cal. 3d 731, 735, 511 P.2d 1197, 1199 (1973)). “In
6 evaluating the legality of a provision, a court must first determine its true function and
7 operation.” *Id.* at 328; *see also Roden v. AmerisourceBergen Corp.*, 155 Cal. App. 4th
8 1548, 1570, 67 Cal. Rptr. 3d 26, 46 (2007) (same). A court must consider whether, when
9 “viewed from the time of making the contract,” the contract “realistically contemplates
10 no element of free rational choice.” *Blank v. Borden*, 11 Cal. 3d 963, 971, 115 Cal. Rptr.
11 31 (1974). “When it is manifest that a contract expressed to be performed in the
12 alternative is in fact a contract contemplating but a single, definite performance with an
13 additional charge contingent on the breach of that performance, the provision cannot
14 escape examination in light of pertinent rules relative to the liquidation of damages.”
15 *Garrett*, 9 Cal. 3d at 738.

16
17 In *Blank*, the California Supreme Court addressed a contract provision providing a
18 party the right to terminate a contract early if she paid a pre-determined fee. The Court
19 concluded that this clause provided:

20 a true option or alternative: if, during the term of an exclusive-
21 right-to-sell contract, the owner changes his mind and decides
22 that he does not wish to sell the subject property after all, he
23 retains the power to terminate the agent’s otherwise exclusive
24 right through the payment of a sum certain set forth in the
25 contract.

26 11 Cal. 3d at 970. In contrast, in *Garrett*, the Court examined a charge for late payment
27 of installments on a contract that was imposed by applying an increased rate in the
28 remaining unpaid principal balance. 9 Cal. 3d at 738. The Court concluded that the

1 charge was an unlawful penalty because it was an “additional sum [charged] as damages
2 for breach.” *Id.*

3 Although California courts have not squarely addressed the issue before the
4 Court—whether a consumer fixed-term installment contract with an ETF is a liquated
5 damages clause or an alternative means of performance—federal courts have applied
6 California law in circumstances substantially similar to those before this Court. Having
7 considered the relevant case law, the Court concludes that the 75% ETFs charged by
8 ADT are an alternative means of performance on the contract.

9 In *Hutchison v. AT & T Internet Services, Inc.*, No. 07–3674, 2009 WL 1726344
10 (C.D. Cal. May 5, 2009), *aff’d sub nom. Hutchison v. Yahoo! Inc.*, 396 F. App’x 331 (9th
11 Cir. 2010), the court held that an ETF for disconnecting Internet and phone services was
12 not a penalty. The court, relying on *Blank*, held that the plaintiffs had a rational choice
13 when they were “presented with two means of fulfilling their obligations under the
14 Agreement: (1) retain the full year of service for approximately \$40 a month, or (2)
15 retain service for less than a year and pay the monthly rate for the service received in
16 addition to the \$200 ETF. *Id.* at *5. In *Hutchison*, the ETF was fixed, and the Court held
17 it was not a penalty even though at a certain point the ETF would exceed the remaining
18 monthly fees. *Id.*

19
20 Here, because the ETF of 75% is *always* less than the option of paying the contract
21 in full, the Court concludes that, viewed at the point of contracting, the option of paying
22 the ETF was a rational choice. *Blank*, 11 Cal. 3d at 971. For example, paying the 75%
23 ETF would be rational for a customer who moved or decided that for some other reason
24 she no longer needed ADT’s services because it would be less expensive than fulfilling
25 her obligations under the full term of the contract. *See Hutchison*, 396 F. App’x at 333,
26 334 (choice between fulfilling contract or paying ETF rational at time of contract and not
27 a penalty); *see also Schneider v. Verizon Internet Servs., Inc.*, 400 F. App’x 136, 138 (9th
28 Cir. 2010) (same); *In re Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 329,

1 122 Cal. Rptr. 3d 726, 752 (2011) (“If this case concerned a Sprint clause that stated
2 customers could terminate term contracts early by paying a fee, then that fee might well
3 be an alternative means of performance.”)

4 Similarly, in *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179 (W.D. Wash.
5 2010), the court held that where “[c]ustomers could elect to fulfill their contract in one of
6 two ways—they could pay for service for the full term of the contract or pay the monthly
7 fee for a shorter term plus the ETF—the choice was rational and the ETF was an
8 alternative method of performance. *Id.* at 1185; *see also Minnick v. Clearwire U.S. LLC*,
9 174 Wash. 2d 443, 450, 275 P.3d 1127, 1131 (2012) (same). The Court noted that “at the
10 time the parties entered the contract, the customer did not know if or when they would
11 cancel their service,” thus the choice was rational as evidenced by the fact that some
12 customers had “elected to incur the ETF” while others decided to continue their monthly
13 payments because it was cheaper. *Id.* Here, with a 25% discount, it is always cheaper for
14 ADT customers with a 75% ETF to pay the ETF rather than fulfill their contractual
15 obligations if they wish to exercise the option of terminating the contract early.
16 Therefore, having the choice to incur the ETF of 75% is rational when viewed at the time
17 of contracting.
18

19 Plaintiffs argue that *Hutchison* and *Minnick* can be distinguished because there the
20 customers were given the choice between two types of contracts. Besides the term
21 contract with an ETF, a month-to-month contract was an available, albeit more
22 expensive, option. *Hutchison*, 396 F. App’x at 333; *Minnick*, 174 Wash. 2d at 446.
23 Although the Ninth Circuit noted the choice between two contracts as one factor in
24 considering whether the choice was rational, its holding did not rest on this fact, and the
25 analyses of the district courts in both *Hutchison* and *Minnick* did not even consider that
26 the plaintiffs could have chosen another contract. *Hutchison*, 2009 WL 1726344, *5;
27 *Minnick*, 174 Wash. 2d at 1185. Furthermore, in *Blank*, the California Supreme Court
28 determined that a contract which allowed a party to terminate early but pay a fee was not

1 a penalty, and did not consider whether there was a second contract to which the party
2 could have agreed. The *Blank* Court's analysis rested solely on the contract at hand. 11
3 Cal. 3d at 970.

4 Accordingly, the Court finds that ADT's ETFs of 75% are not an unlawful penalty
5 as a matter of law. The Court **GRANTS** the motion for summary judgment on Count I
6 for violation Cal. Civ. Code § 1671 as to Adamson.

7 **D. Count II On Behalf of Adamson - Violations of the CLRA.**

8 ADT's Motion includes one sentence asserting that Plaintiffs' second cause of
9 action under the CLRA fails because the ETFs are valid. (Mot. at 15.) Although the
10 Court has concluded above that the ETFs are valid alternative performance provisions,
11 Plaintiffs' second cause of action for a violation of the CLRA is not based solely on the
12 ETFs' validity. Plaintiffs also allege that ADT violated Cal. Civ. Code §§ 1770(a)(5),
13 1770(a)(9), 1770 (a)(14) by failing to adequately disclose the ETFs. ADT's Motion does
14 not address these allegations. The Court therefore **GRANTS** the Motion for Summary
15 Judgment on Adamson's CLRA claims to the extent they are based on charging the
16 ETFs. The Court **DENIES** the Motion to the extent those claims are based on the failure
17 to disclose the ETFs.
18

19 **E. Counts III, IV, and V - Violations of Cal. Bus. & Prof. Code § 17200 et seq.**

20 The UCL prohibits "unfair competition," which includes "any unlawful, unfair, or
21 fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "Because the
22 statute is written in the disjunctive, it is violated where a defendant's act or practice
23 violates any of the . . . prongs." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168
24 (9th Cir. 2012) (citing *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir.
25 2007)). Plaintiffs allege that ADT's conduct violates all three prongs of the UCL. The
26 Court addresses each prong in turn.
27
28

1 **1. Count III on Behalf of Adamson - Unlawful Business Practices.**

2 The unlawful prong “borrows violations of other laws and treats them as unlawful
3 practices that the unfair competition law makes independently actionable.” *Davis*, 691
4 F.3d at 1168 (citing *Cel-Tech Comm’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
5 163, 180, 83 Cal. Rptr. 2d 548 (1999)). “[V]irtually any state, federal or local law can
6 serve as the predicate for an action under section 17200.” *Id.* (citing *People ex rel. Bill*
7 *Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463 (2002)).
8 Because the Court has concluded that the ETFs of 75% are not unlawful penalty
9 provisions, these ETFs also are not unlawful under Section 17200. Plaintiffs’ third cause
10 of action for violation of the UCL based on unlawful business practices is limited to the
11 validity of the ETFs.⁶ Therefore, ADT’s Motion for Summary Judgment on Plaintiffs’
12 third cause of action is **GRANTED** as to Adamson.

13 **2. Count IV on Behalf of Adamson - Unfair Business Practices.**

14 Conduct is “unfair” under the UCL either if it “offends an established public policy
15 or when the practice is immoral, unethical, oppressive, unscrupulous or substantially
16 injurious to consumers,” or when the alleged unfairness is “tethered to some legislatively
17 declared policy” or has an “actual or threatened impact on competition.” *Davis*, 691 F.3d
18 at 1169-70. Count IV asserts several allegations relating to the unfairness of the 75%
19 ETFs, which fail on the basis of the Court’s conclusion that they are valid alternative
20 performance provisions. Count IV also alleges that ADT’s imposition of unilateral price
21 increases violates the unfair prong of the UCL. Yet, it is undisputed that Adamson has
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23
24

25 ⁶ In the SAC, Plaintiffs also allege that the UCL’s unlawful prong is violated based on the
26 violation of TILA. (SAC ¶ 124.) Plaintiffs’ TILA claim, however, is raised only on behalf of
27 Llewellyn, the Georgia Plaintiff. (SAC – Count VII pg. 32.) Plaintiffs’ UCL claims are asserted only
28 on behalf of California Plaintiffs Adamson and Clark. (SAC – Count III pg. 24). Moreover, the UCL
unlawful claim appears to be premised on the ETFs, and the parties agree that Adamson neither paid nor
was charged an ETF because he is still a customer.

1 not been charged nor has he paid an increased rate, and Count IV is raised only with
2 respect to Adamson. (CSSUF ¶ 8.)

3 Accordingly, ADT's Motion for Summary Judgment on Count IV is **GRANTED**.

4 **3. Count V on Behalf of Adamson - Fraudulent Business Practices.**

5 "A business practice is fraudulent under the UCL if members of the public are
6 likely to be deceived." *Davis*, 691 F.3d at 1169. Plaintiffs' allegations that ADT violated
7 the fraud prong of the UCL are summarized as follows: (1) failing to adequately disclose
8 material information, including the ETFs; (2) failing to disclose that contracts may be
9 extended or an ETF applied if a customer moves prior to the termination of the contract;
10 and (3) charging unlawful ETFs. ADT moves for summary judgment on Count V on the
11 basis that the 75% ETFs are lawful. (Mot. at 15.) It fails to make any arguments
12 regarding adequate disclosure of the ETFs and the other allegations constituting
13 Plaintiffs' fraud claim.

14 ADT's Motion for Summary Judgment is therefore **GRANTED** on Count V to the
15 extent it is based on the validity of 75% ETFs, and is **DENIED** on Plaintiffs' claims that
16 ADT failed to properly disclose the ETFs and the possible extension of contracts.

17 **F. Count VI on Behalf of Stanley and Warncke – Violations of the Maryland**
18 **Consumer Protection Act.**

19 ADT makes the conclusory assertion that because ADT's ETF of 75% is an
20 alternative means of performance under California law, Plaintiffs' ETF claims on behalf
21 of Stanley and Warncke under Maryland law also fail. (Mot. at 15.) Yet, ADT's Motion
22 raises no argument regarding the Maryland claims. Moreover, Plaintiffs' claims under
23 the Maryland Consumer Protection Act include failure to adequately disclose the ETFs
24 and false advertising—not just the validity of the ETFs. (SAC – Count VI pg. 29.)
25 Finally, ADT states that it does not challenge the validity of Warncke's ETF, which is
26 100%. (Mot. at 9.)
27
28

1 In the absence of briefing on Maryland law, the Court **DENIES** the Motion for
2 Summary Judgment on Count VI.

3 **G. Count VII on behalf of Llewellyn – Violation of TILA.**

4 **1. Llewellyn’s TILA Claim is Not Time-Barred.**

5 Llewellyn alleges that the amount of his payments was not properly disclosed at
6 the time of contracting, as required by TILA, 15 U.S.C. § 1638(6), because ADT
7 unilaterally increased his rates after the first year of his contract. The parties agree that
8 Llewellyn signed his ADT contract on August 11, 2011, first paid the unilateral price
9 increase in October 2012, and Plaintiffs filed this suit on December 10, 2012. (Slattery
10 Decl. ¶¶ 12-13, Exh. K, L.) ADT asserts that the one-year limitations period under 15
11 U.S.C. § 1640(e) for TILA claims commenced when the contract was signed and thus
12 expired before this suit was filed. Plaintiffs argue that equitable tolling applies.

13 A plaintiff may bring a TILA claim “within one year from the date of the
14 occurrence of the violation.” 15 U.S.C. § 1640(e). In *King v. State of California*, 784
15 F.2d 910 (9th Cir. 1986), the Ninth Circuit described the accrual of claims under TILA
16 and when they are subject to equitable tolling:

17 [W]e hold that the limitations period in Section 1640(e) runs
18 from the date of consummation of the transaction but that the
19 doctrine of equitable tolling may, in the appropriate
20 circumstances, suspend the limitations period until the borrower
21 discovers or had reasonable opportunity to discover the fraud or
22 nondisclosures that form the basis of the TILA action.
23 Therefore, as a general rule the limitations period starts at the
24 consummation of the transaction. The district courts, however,
25 can evaluate specific claims of fraudulent concealment and
26 equitable tolling to determine if the general rule would be
27
28

1 unjust or frustrate the purpose of the Act and adjust the
2 limitations period accordingly.

3 *Id.* at 915. “[T]he mere existence of TILA violations and lack of disclosure does not
4 itself equitably toll the statute of limitations.” *Garcia v. Wachovia Mortg. Corp.*, 676 F.
5 Supp. 2d 895, 906 (C.D. Cal. 2009) (citing *Hubbard v. Fidelity Federal Bank*, 91 F.3d
6 75, 79 (9th Cir. 1996) (noting that a contrary rule would toll the limitations period
7 whenever there were improper disclosures).

8 Plaintiffs assert that the limitations period was tolled until October 2012, when
9 ADT unilaterally raised Llewellyn’s monthly rate. They contend that Llewellyn could
10 not have known that ADT *would* increase his rates until it did raise them—the contract
11 provided only that ADT *could* raise the rates. The contract provides: “[A]t times we
12 need to reevaluate our rates due to increasing costs of doing business. Thus ADT
13 contracts allow for periodic increases.” (CSSUF ¶ 27.) In addition, ADT reserves the
14 right to increase its monthly fees only after the first year of the contract. (CSSUF ¶ 23.)
15 Plaintiffs therefore argue that if, as ADT asserts, the limitations period commenced on
16 the day the contract was signed, ADT would effectively immunize itself from TILA
17 claims based on rate increases because a plaintiff’s TILA claim could never become ripe
18 within the one-year-limitations period.
19

20 Because Llewellyn’s contract did not state that his rates *would* increase and by how
21 much, he lacked notice that the amount of his monthly payments was inadequately
22 disclosed until ADT increased his monthly payment. As another court in this circuit
23 explained, where “the violation complained of consists of non-disclosure, there can be no
24 notice of the term or terms that were not disclosed until those terms are imposed on the
25 loan.” *Yang v. Home Loan Funding, Inc.*, No. 07-1454, 2010 WL 670958, *6 (E.D. Cal.
26 Feb. 22, 2010).

27 In this case, the Court finds that the limitations period was equitably tolled until
28 October 2012, when ADT first increased Llewellyn’s rates. Llewellyn’s TILA claim is

1 therefore timely. *See Plascencia v. Lending 1st Mortgage*, 583 F. Supp. 2d 1090, 1097
2 (N.D. Cal. 2008) (declining to apply TILA’s limitations period because “while the Note
3 and the Statement are literally accurate, Plaintiffs may be able to show that Defendants
4 obscured crucial terms of the mortgage”); *Yang*, 2010 WL 670958, *5-6 (although TILA
5 violations were “evident on the face of the loan documents . . . plaintiff had no way of
6 discovering those terms . . . until the wrongful terms were imposed).

7 Accordingly, ADT’s Motion for Summary Judgment on Llewellyn’s TILA claim
8 on the basis that it is untimely is **DENIED**.

9 **2. There is a Material Question of Fact Regarding Whether ADT’s**
10 **Contracts Are Consumer Credit Transactions.**

11 TILA mandates certain disclosures by a creditor for “each consumer credit
12 transaction other than an open end credit plan.” 15 U.S.C. § 1638(a). A “consumer
13 credit transaction” under TILA refers to “credit offered or extended to a consumer
14 primarily for personal, family, or household purposes” by a creditor. 12 C.F.R. §
15 226.2(a)(12). A creditor is:

16 a person who both (1) regularly extends, whether in connection with loans,
17 sales of property or services, or otherwise, consumer credit which is payable
18 by agreement in more than four installments or for which the payment of a
19 finance charge is or may be required, and (2) is the person to whom the debt
20 arising from the consumer credit transaction is initially payable

21 15 U.S.C. § 1602(g). Credit is “the right granted by a creditor to a debtor to defer
22 payment of debt or to incur debt and defer its payment.” 15 U.S.C. § 1602(e).

23 As this Court outlined in its Order Re Defendant’s Motion for Judgment on the
24 Pleadings, a contract need not include a credit transaction on its face to fall within
25 TILA’s parameters. (*see* Order at 5-6 [Doc. # 60] (citing *Mourning v. Family Publ’ns*
26 *Serv., Inc.*, 411 U.S. 356, 366-67, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973)). In *Mourning*,
27 the Supreme Court noted the risk of entities “‘burying’ the cost of credit in the price of
28

1 goods sold” to circumvent TILA. 411 U.S. at 366. “Thus in many credit transactions in
2 which creditors claimed that no finance charge had been imposed, the creditor merely
3 assumed the cost of extending credit as an expense of doing business, to be recouped as
4 part of the price charged in the transaction.” *Id.*

5 The Court has found little guidance regarding when an installment contract
6 constitutes a “consumer credit transaction” under TILA, and the parties fail to cite any
7 case other than *Mourning*, which does not address the question. Although it does not
8 consider a TILA claim, *People of the State of California v. ADT Security Services, Inc.*, is
9 instructive. In that case, a California trial court held that ADT’s contracts were subject to
10 California’s Unruh Act, Cal. Civ. Code § 1801.1, and failed to comply with the Act’s
11 disclosure requirements. *People of the State of California v. ADT Security Services, Inc.*,
12 No. No. 08-01301 (Nov. 6, 2009). (Declaration of Timothy Fisher in Opposition to
13 Motion for Judgment on the Pleadings, Exh. D [Doc. # 53-5].) The Court reasoned, after
14 examining California law, that where a party enters a non-cancellable contract payable in
15 installments, the contract is “considered to contain a hidden finance charge . . . [because]
16 a ‘promise’ has been received by the buyer for which payment can be fully determined
17 and, if paid over a period of time, the buyer is entitled to know whether he or she is
18 paying extra, i.e. a finance charge, for the privilege of paying in installments.” *Id.* at 2.
19 The contracts at issue in *ADT Security Services* were ADT’s contracts with ETFs of 75%.
20 *Id.* at 4. The Court distinguished *Crawford v. Farmers Grp., Inc.*, 160 Cal. App. 3d 1164,
21 207 Cal. Rptr. 155 (1984), where the installment contract provided one month of
22 coverage for each month an insurance premium was paid—without any obligation to pay
23 or purchase beyond that month—and thus was not governed by TILA *Id.* at 2.

24
25 In *Odier v. Hoffmann School of Martial Arts, Inc.*, 619 F. Supp. 2d 571 (N.D. Ind.
26 2008), the Court held that an installment contract for classes constituted a credit
27 transaction under TILA because students could receive classes before payment. *Id.* at
28 580. It also noted that the plaintiff could not cancel the contract and stated in *dicta* that

1 the ability to cancel an agreement “may be . . . what distinguishes between agreements
2 that do extend credit and those that do not under the Truth in Lending Act.” *Id.* at 581.
3 In asserting this proposition, it looked to insurance premiums, noting that under 12 C.F.R.
4 § 226, otherwise known as Regulation Z (which implements the Truth in Lending Act,
5 *see* 12 C.F.R. § 226.1 (a)), “[i]nsurance premium plans that involve payment in
6 installments with each installment representing the payment for insurance coverage for a
7 certain future period of time” is not subject to TILA—“unless the consumer is
8 contractually obligated to continue making payments.” *Id.* (citing 12 C.F.R. 226,
9 supplement 1, F.R.R.S. 6-1162.1).

10 Plaintiffs proffer sufficient evidence to create an inference that ADT’s contracts
11 involve “consumer credit transactions” under TILA. If ADT cancels the contracts, “ADT
12 will refund any advance payments made for services to be supplied after the date of such
13 termination, *less any amounts still due for the installation of the equipment*, for services
14 already rendered and for any other charges due.” (Slattery Depo. ¶ 12, Exh. K at pg. 6 pt.
15 19(A) [Doc. # 75-12] (emphasis added).) In addition, when his equipment failed,
16 Llewellyn was offered the choice between paying for new equipment and labor for
17 installation, or signing a new “longer term” contract that would cover “the installation of
18 that new equipment.” (Fisher Decl. ¶ 8, Exh. F (“John Llewellyn Depo. 13:1-7, 19-23
19 [Doc. # 85-1].)”) Finally, even if Plaintiffs cancel their contract, they are required to pay
20 an ETF—their obligations do not terminate when they decide to stop receiving monthly
21 security monitoring from ADT. *See Odier*, 619 F. Supp. 2d at 580; *Crawford*, 160 Cal.
22 App. 3d at 1170.
23

24
25
26 ⁷ Drawing all reasonable inferences in favor of Plaintiffs, the Court finds that this fact creates at
27 least an inference that the monthly fees are not limited to monitoring costs and also include, at least in
28 some cases, installation and equipment. If there were no relationship between the monthly fee and the
cost of installation and equipment, ADT could have simply replaced Llewellyn’s failed equipment and
continued with the existing contract.

1 During oral argument, ADT argued that there was no evidence that ADT's
2 contracts bury consumer credit transactions, pointing to testimony by Barbara Rabba that
3 ADT's monitoring fee is the same whether or not an independent dealer or ADT provides
4 the equipment. (CSSUF ¶ 41.) As noted above, under ADT policy, ADT dealers can
5 charge "what's reasonable," as long as the dealer charges a minimum of \$99.
6 (Supplemental Declaration of Paul Slattery ¶ 3, Exh. B "(Barbara Rabba Depo.*)" at
7 35:21-24 [Doc. # 98-2].) Given the above evidence, the Court concludes that there is a
8 material dispute of fact such that a reasonable jury could find that ADT's contracts
9 involve a consumer credit transaction.⁸

10 ADT's Motion for Summary Judgment is **DENIED** to the extent it is based on the
11 argument that its contracts are not subject to TILA.

12 **3. There is a Triable Issue of Fact Regarding Whether the Increased Fee**
13 **Provision Violates TILA.**

14 TILA mandates that for "each consumer credit transaction other than under an
15 open end credit plan," a creditor must make various disclosures, including the number,
16 amount, and due dates or period of payments scheduled to repay the total of payments.
17 15 U.S.C. § 1638(a)(6); 12 C.F.R. § 226.18(g). The SAC alleges that ADT failed to
18 adequately disclose the amount of Llewellyn's payments. (SAC ¶ 176.) Llewellyn's
19 contract did not state that his rate would necessarily increase or by how much. (*Id.* ¶ 179;
20 Slattery Depo. ¶ 12, Exh. K [Doc. # 75-12].) ADT argues that its increased fee provision
21 is "lawful as a matter of law" because it is straightforward and allows the customer to
22

23
24 ⁸ During oral argument, ADT also argued that Defendant's Uncontroverted Fact # 42 is
25 undisputed and warrants summary judgment. In Uncontroverted Fact # 42, ADT states that "ADT's
26 monitoring fee is the same whether or not the customer pays the entire contract up front or month to
27 month," citing Pope Depo. at 109:16-23 [Doc. # 75-21].) In the cited testimony, Pope stated that
28 customers are not currently offered discounts for paying all of their charges up front and he does not
know whether customers have ever been offered such discounts. (*Id.*) Regardless, given Plaintiffs'
countervailing evidence, the Court concludes that there is a material dispute of fact as to whether the
contracts bury hidden credit.

1 object to the increase and cancel the contract with no fee. (Mot. at 13.) Yet, these
2 arguments appear to focus on whether Plaintiffs can show violations of Cal. Bus. & Prof.
3 Code § 17200. (See Mot. at 13-14.) ADT does not address why the unilateral fee
4 increase provision is valid under TILA, except to argue that TILA does not apply because
5 the contracts do not involve credit. (Mot. at 15-16.)

6 Because the Court has determined that there is a material dispute of fact as to
7 whether ADT's contracts are subject to TILA, and ADT presents no other arguments
8 regarding the merits of Llewellyn's TILA claim, the Court **DENIES** summary judgment
9 on the TILA claim to the extent it is based on the unilateral price increase.

10 ADT also moves for summary judgment on the TILA claim on the basis that
11 Llewellyn was never charged an ETF. (Mot. at 20-21.) Plaintiffs fail to address this
12 argument in their Opposition (Opp'n 21-25), and appear to concede it: They characterize
13 Llewellyn's TILA claim as limited to the unilateral price increase. (*Id.* at 21.) Summary
14 judgment is therefore **GRANTED** on Llewellyn's TILA claim to the extent it is based on
15 payment of an ETF.

16
17 **H. Count VIII (Declaratory Relief) and Count IX (Unjust Enrichment) on Behalf**
18 **of All Plaintiffs**

19 Plaintiffs' claims for declaratory relief and unjust enrichment are premised on the
20 legality of the ETFs and the unilateral price increases. Due to the Court's determinations
21 above, the Motion for Summary Judgment on the declaratory relief and unjust enrichment
22 claims is: (1) **DENIED** to the extent these claims for relief are based on ADT's
23 unilateral price increases; (2) **GRANTED** to the extent they are based on the ETFs in
24 Adamson and Llewellyn's contracts; and (3) **DENIED** as to the ETF claims under
25 Maryland law.
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V.

CONCLUSION

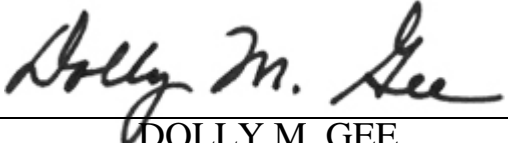
In light of the foregoing, the Court orders as follows:

1. Summary Judgment is **GRANTED** on Clark's claims due to lack of Article III standing;
2. Summary judgment is **GRANTED** on the first cause of action for violation of Cal. Civ. Code § 1671 as to Adamson;
3. Summary judgment is **GRANTED** on the second cause of action as to Adamson for violations of CLRA based on legality of the ETFs of 75% and **DENIED** on Adamson's claims that ADT violated the CLRA, Cal. Civ. Code §§ 1770(a)(5), 1770(a)(9), 1770 (a)(14), by failing to adequately disclose the ETFs;
4. Summary judgment is **GRANTED** on the third cause of action for violation of the unlawful prong of UCL, Cal. Bus. & Prof. Code § 17200 *et seq.* as to Adamson;
5. Summary judgment is **GRANTED** on the fourth cause of action for violation of the unfair prong of UCL, Cal. Bus. & Prof. Code § 17200 *et seq.* as to Adamson;
6. Summary judgment is **GRANTED** on the fifth cause of action for violation of the fraud prong of the UCL, Cal. Bus. & Prof. Code § 17200 *et seq.* as to Adamson's claim that the ETFs of 75% are invalid and **DENIED** on Adamson's claims that ADT failed to properly disclose the ETFs and the possible extension of contracts;
7. Summary judgment is **DENIED** on the sixth cause of action on behalf of Stanley and Warncke for violations of the Maryland Consumer Protection Act;

8. Summary judgment is **DENIED** on the seventh cause of action on behalf of Llewellyn for violations of the Truth in Lending Act, 15 U.S.C. § 1601, on unilateral fee increases and **GRANTED** on ETFs of 75%;
9. Summary judgment is **GRANTED** on the eighth cause of action for declaratory relief as to the validity of the 75% ETF fees as to Adamson and Llewellyn, and is **DENIED** on all other grounds;
10. Summary judgment is **GRANTED** on the ninth cause of action for unjust enrichment as to the validity of the 75% ETFs as to Adamson and Llewellyn, and is **DENIED** on all other grounds;
11. The Motion to Dismiss [Doc. # 64] is **DENIED** as moot; and
12. The Parties shall meet and confer to stipulate to a supplemental briefing schedule on Plaintiffs' causes of action regarding failure to disclose under the CLRA and UCL. The Parties supplemental briefs shall be no more than 10 pages in length, exclusive of declarations, exhibits, and supplemental statements of uncontroverted facts or genuine disputed issues.

IT IS SO ORDERED.

DATED: April 7, 2014



DOLLY M. GEE
UNITED STATES DISTRICT JUDGE